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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DEBRA LOUISE et al.,

Plaintiffs and Respondents,

v.

HOWARD JARVIS TAXPAYERS
ASSOCIATION,

Defendant and Appellant.

B289148

(Los Angeles County
Super. Ct. No. BC678951)

APPEAL from an order of the Superior Court of Los Angeles County, Howard L. Halm, Judge. Reversed and remanded with directions.

Jonathan M. Coupal, Trevor A. Grimm, Timothy A. Bittle and Laura E. Murray for Defendant and Appellant.

Shenkman & Hughes, Kevin I. Shenkman, Mary R. Hughes and Andrea A. Alarcon for Plaintiffs and Respondents.

Howard Jarvis Taxpayers Association (Jarvis) appeals an order denying its special motion to strike (Code Civ. Proc., § 425.16) a complaint filed by plaintiffs and respondents Debra Louise (Louise),¹ Lynette Merritt (Merritt), Shawn Robison (Robison), and Cristina Romero (Romero)² (collectively, Plaintiffs), in which they alleged that Jarvis fraudulently induced registered voters to sign a petition to recall Democratic State Senator Josh Newman (Newman).³

We conclude the trial court erred in denying the special motion to strike because Plaintiffs failed to meet their burden of establishing a probability of prevailing on their fraud claim. Accordingly, the order is reversed and the matter is remanded with directions to grant Jarvis's special motion to strike.

FACTUAL AND PROCEDURAL BACKGROUND

1. Pleadings.

¹ Louise appears in the record as both Debra Louise and Debra Louise Cembrano. For clarity we refer to her as Louise throughout.

² At oral argument, this court was advised that Romero is no longer a party to this action.

³ The order denying the special motion to strike, or anti-SLAPP motion, is appealable. (Code Civ. Proc., § 425.16, subd. (i), § 904.1, subd. (a)(13).) SLAPP is an acronym for “‘strategic lawsuit against public participation.’” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn .1.)

All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

On October 10, 2017, Plaintiffs filed a complaint that alleged a single cause of action for fraud and named as defendants Jarvis and others, not parties to this appeal, including the California Republican Party and National Petition Management, Inc. (NPM), a company that was hired to gather signatures for the recall petition. Plaintiffs alleged the defendants concocted a scheme to deceive voters into signing a petition to recall Newman by misrepresenting the recall petition as a petition to repeal a so-called gas tax. The four Plaintiffs alleged that during mid-2017, they were approached by paid signature gatherers who stated the petition was to repeal the gas tax, without any mention of a recall of Newman. Based on the signature gatherers' representations, Plaintiffs signed the recall petition.

Plaintiffs further alleged they reasonably relied on the signature gatherers' misrepresentations and were damaged by being denied the opportunity to make an informed choice in affixing their signatures to the recall petition. Plaintiffs sought nominal, compensatory, and punitive damages according to proof, as well as a judicial declaration that the defendants' conduct was fraudulent and unlawful.

2. Special motion to strike.

On January 16, 2018, Jarvis filed a special motion to strike, contending the action arose from Jarvis's protected petitioning activity, and Plaintiffs could not prevail on their fraud claim against Jarvis. As to the merits of the action, Jarvis argued that with rare exceptions not applicable here (e.g., illiteracy), individuals are obligated to read documents before signing them and cannot base a cause of action on the theory that they did not know what they were signing because they did not read it.

Jarvis stated: “California law distinguishes between fraud in the ‘execution’ and fraud in the ‘inducement.’ In the former case, the signer is deceived as to the nature of the document ‘and actually does not know what he is signing.’ [Citation.] In the latter case, the signer knows and understands what he is signing but is induced to sign it by false pretenses (e.g., ‘Your son has been arrested and needs to post bail’). [Citation.] In the case at bar, Plaintiffs allege that, due to signs they saw and/or something the petition circulator said, they signed a recall petition mistakenly believing it was a petition to repeal the gas tax. (Complaint, par. 38—41.) This, then, is a case alleging fraud in the execution. Failure to read a document that one has an opportunity to read before signing is an absolute bar to a claim of fraud in the execution.”

Jarvis further argued that Plaintiffs could not argue that they lacked the opportunity to read the recall petition before signing it, and the petition made clear its true purpose. “To ensure that voters can make an informed choice when asked to sign a petition, the design and contents of the petition are dictated by the Elections Code, and must be pre-approved by the Secretary of State as conforming thereto. [Citations.] That was done here.” For example, the “heading ‘PETITION FOR RECALL’ is emblazoned in 12 point, bold-face, capital letters across the top of every signature page.” Further, in the first 150 words of the petition, its purpose of recalling and replacing Newman was mentioned seven times.

Jarvis contended that if “Plaintiffs did sign a recall petition as they claim, then they were signing the very page that includes all of the information quoted above. It is unreasonable to sign a sheet of paper without reading any of it, not even its heading. . . .

Plaintiffs' failure to read the sheet of paper they were signing bars their cause of action for fraud in the execution." Moreover, "if Plaintiffs did not read what they signed, then it is impossible for them to prove that they mistakenly signed a recall petition."

3. *Plaintiffs' opposition to the special motion to strike.*

In opposition, Plaintiffs contended that Jarvis's conduct as alleged in their complaint was "not immunized simply because it ha[d] some connection to speech and petitioning" activity. Plaintiffs argued that Jarvis did not contest the fact that false statements were made to them to induce them to sign the recall petition, and that fraudulently inducing the signing of a document is actionable, even where the misrepresentations contradict the express written terms of the document. Plaintiffs emphasized that they were seeking damages and equitable relief, not a declaration that the recall petition they signed was void. They argued their action "is only barred by their failure to carefully read the petition if their reliance on the misrepresentations of Defendants and their agents was not just negligent, but also 'preposterous or irrational.'" Plaintiffs asserted their reliance was reasonable in light of Jarvis's pervasive advertising campaign and the fact that many other individuals were similarly duped into signing the recall petition.

Plaintiffs also contended that because NPM, a petition signature gathering company, lent its employees to Jarvis, which paid for that company's employees to gather signatures, Jarvis was liable for the employees' deception under the doctrine of respondeat superior.

The opposition papers included declarations by three of the four Plaintiffs, Louise, Merritt, and Robison. Louise stated a man came to her house indicating he was a volunteer collecting

signatures for a petition that would lower her gas bill. Merritt and Robison stated they were approached by men outside a Walmart store and a Target store, respectively, who asked if they wanted to sign a petition to get rid of the gas tax. Louise stated that several months after she signed the petition, she learned that the petition she signed “was almost certainly a petition to recall Josh Newman.” Similarly, Merritt and Robison stated that they subsequently learned that the petition they signed was a recall petition and would have no impact on the gas tax.

The opposition papers also included declarations from other voters, not parties to the action, who stated they were misled by signature gatherers into signing the recall petition.

4. *Trial court tentatively ruled it would grant the special motion to strike and then allowed Plaintiffs to file supplemental declarations.*

The trial court tentatively ruled that it would grant Jarvis’s special motion to strike. The tentative ruling stated that Plaintiffs had failed to plead damages with sufficient specificity, and “[b]ecause damages is a required element of a fraud cause of action, . . . Plaintiffs have failed to shoulder their burden of proof as to the probability of prevailing on the Complaint.”

At the hearing on the special motion to strike, counsel for Plaintiffs objected to Jarvis’s late-filed reply memorandum and reply declarations, and requested leave to amend the complaint to plead emotional distress damages with greater specificity. The trial court ruled that Plaintiffs could file a rebuttal to Jarvis’s reply papers within five days, and the matter would then be taken under submission.

Plaintiffs thereafter filed a “sur-reply” to the special motion to strike, as well as supplemental declarations with respect to

their claimed emotional distress. Louise stated she was “very upset to learn that [she] was lied to and tricked into signing a petition to recall Josh Newman.” Merritt stated she was “greatly distressed by the fact that [she] was duped into signing a petition to recall [Newman].” Robison stated: “I am angry and embarrassed that I was conned into signing a petition to recall Josh Newman.”

5. *Trial court’s final ruling denying the special motion to strike.*

After tentatively ruling that it would grant Jarvis’s special motion to strike, the trial court issued a final order denying the motion. The trial court ruled, inter alia, “the fact that Plaintiffs failed to read the recall petition does not preclude, as a matter of law, their ability to prove justifiable reliance.” The trial court found that Plaintiffs proffered sufficient evidence to make a prima facie showing of justifiable reliance, noting that many other individuals similarly signed the recall petition mistakenly believing it to be a petition to repeal the gas tax.

As for the nature of the petition that Plaintiffs signed, the trial court cited declarations stating that the only petition being circulated during the relevant time period at the relevant locations was the Newman recall petition. The trial court also found sufficient evidence that Jarvis could be held vicariously liable for the actions of signature gatherers who were employed by NPM, with which Jarvis contracted for signature gathering services.

With respect to damages, the trial court found that Plaintiffs had “failed to plead damages with sufficient specificity,” and “[b]ecause damages is a required element of a fraud cause of action, *the Court finds that Plaintiffs have failed to shoulder their*

burden of proof as to the probability of prevailing on the Complaint.” (Italics added.)

Nevertheless, the trial court denied the special motion to strike, noting that Plaintiffs’ papers had requested leave to amend and that Plaintiffs’ supplemental declarations had shown that Plaintiffs could allege emotional distress damages. The trial court granted Plaintiffs 20 days leave to amend the complaint to plead emotional distress damages.⁴

Jarvis filed a timely notice of appeal from the March 12, 2018 order denying its special motion to strike.

CONTENTIONS

Jarvis contends the trial court erred in denying the special motion to strike because Plaintiffs’ action clearly arose from Jarvis’s protected activity; Jarvis further urges Plaintiffs cannot prevail on their fraud claim because (1) the law does not provide a private right of action for the conduct alleged in the complaint; (2) Plaintiffs cannot prove the petition they signed was a petition to recall Newman; (3) Plaintiffs cannot identify the individuals who misled them and offered no proof that those individuals were Jarvis’s agents; (4) the allegedly false statements, if made, were protected political speech; (5) the petition, if it was a recall petition, was clearly labeled as such, and Plaintiffs had an opportunity to read it; and (6) mistakenly signing a political petition is not a remediable injury.

⁴ A plaintiff may be granted leave to amend a complaint where evidence submitted in opposition to the anti-SLAPP motion shows a probability that plaintiff may prevail on the merits. (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 870–872; Weil & Brown et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2019) § 6:665.5.)

DISCUSSION

Jarvis is entitled to the grant of its special motion to strike because Plaintiffs' lawsuit arose out of Jarvis's protected petitioning activity, and Plaintiffs failed to meet their burden to establish a probability of prevailing on their fraud claim.

a. General principles.

“A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).)

We review an order granting or denying an anti-SLAPP motion de novo, conducting the same two-step process as does the trial court to determine whether (1) as a matter of law, the defendant met its initial burden of showing the challenged claim arose out of the defendant's protected activity and, (2) if so, whether the plaintiff met its burden of showing a probability of success. (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 112–113.)

b. *Prong one: Jarvis met its burden to establish the fraud cause of action arose from its right of petition.*

The parties agree that the fraud claim, which alleges that Jarvis fraudulently helped orchestrate the Newman recall, arose from protected activity, i.e., Jarvis's alleged involvement in the recall campaign. (§ 425.16, subds. (e)(3), (e)(4); see also *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 907–908 [noting constitutional right to petition for redress of grievances

and to initiate change directly through initiative, referendum or recall].)

Therefore, the issue before us relates solely to the second prong of the anti-SLAPP analysis, namely, whether Plaintiffs met their burden to establish a probability of prevailing on their fraud claim. (§ 425.16, subd. (b)(1).)

c. Prong two: Plaintiffs failed to establish a probability of prevailing on their fraud claim; no prima facie showing that the signature gatherers who procured their signatures were agents of Jarvis.

To show a probability of prevailing for purposes of section 425.16, a plaintiff must make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor. (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 663–664 (*Alpha*); *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.)

In determining whether Plaintiffs met their burden to make a prima facie showing, we are mindful that fraud must be pled with particularity, and the particularity requirement obligates a plaintiff to show how, when, where, to whom, and by what means the representations were tendered. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 (*Lazar*).) Further, a plaintiff's burden “in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must ‘allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.’” (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)” (*Lazar, supra*, 12 Cal.4th at p. 645.)

Here, as discussed below, in opposing Jarvis's special motion to strike, Plaintiffs failed to make a prima facie showing of the necessary facts to support a judgment in their favor.

Louise's opposing declaration stated: In either April or May of 2017, a man came to her house with a petition. He stated he was a volunteer collecting signatures for a petition that would lower the price of gas, and she signed the petition.

Merritt's declaration stated that she visited a Walmart store in Diamond Bar in late May or early June of 2017, and noticed a booth adorned with signs stating "Stop the Gas Tax." On her way into the store she was approached by a man with a clipboard who asked if she wanted to sign a petition to eliminate the gas tax, and she did so.

Similarly, Robison's declaration stated that in June 2017, he visited a Target store in Diamond Bar and noticed a table wrapped in signs stating "Stop the Gas Tax." As he was leaving the store, he was approached by a young man, probably under the age of 21, who wore a shirt with a slogan related to the repeal of the gas tax. The young man asked Robison if he wanted to sign a petition to get rid of the gas tax, and Robison did so.

Plaintiffs' declarations did not provide any other details with respect to the identity of the individuals who procured their signatures, or the relationship of those individuals to Jarvis. Plaintiffs did not seek discovery, which they could have requested (§ 425.16, subd. (g); *Kyle v. Carmon*, *supra*, 71 Cal.App.4th at p. 907), in order to establish the identity of the signature gatherers and to establish that those individuals were in fact acting as agents of Jarvis.

Thus, in opposing the special motion to strike, there was an utter failure by Plaintiffs to make out a prima facie case against

Jarvis. Plaintiffs lacked evidence as to the identity of the individuals who obtained Plaintiffs' signatures, Plaintiffs had no evidence to support their theory that the signature gatherers were employees of NPM who were acting as agents of Jarvis, and no evidence to establish that any of the signature gatherers was anything other than an unpaid campaign volunteer. Plaintiffs simply sought to impute the statements of the individual signature gatherers to Jarvis, without showing that Jarvis was their principal.

Plaintiffs conceded below that they did not know whether the individuals who obtained their signatures were paid employees of NPM or unpaid campaign volunteers. Plaintiffs acknowledge on appeal that that they did not establish the identity of the signature gatherers but contend they need not do so because Jarvis is liable for the signature gatherers' misrepresentations due to Jarvis's "concerted action" with the California Republican Party and NPM.

In support, at oral argument, Plaintiffs invoked *Summers v. Tice* (1948) 33 Cal.2d 80 (*Summers*). However, that decision has no application to this fact situation. As discussed in *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588 (*Sindell*), in *Summers* "the plaintiff was injured when two hunters negligently shot in his direction. It could not be determined which of them had fired the shot that actually caused the injury to the plaintiff's eye, but both defendants were nevertheless held jointly and severally liable for the whole of the damages. [*Summers*] reasoned that both were wrongdoers, both were negligent toward the plaintiff, and that it would be unfair to require plaintiff to isolate the defendant responsible, because if the one pointed out were to escape liability, the other might also, and the plaintiff-victim

would be shorn of any remedy. In these circumstances, [Summers] held, the burden of proof shifted to the defendants, ‘each to absolve himself if he can.’ (*Id.*, p. 86.) [Summers] stated that under these or similar circumstances a defendant is ordinarily in a ‘far better position’ to offer evidence to determine whether he or another defendant caused the injury.” (*Sindell, supra*, 26 Cal.3d at pp. 598–599.)

Here, Plaintiffs cannot bring themselves within the rule articulated in *Summers*. Among other things, Plaintiffs did not make a prima facie showing that Jarvis was a wrongdoer that acted in concert with other wrongdoers in the action. Additionally, Plaintiffs cite no authority for the proposition that the *Summers* analysis applies to a cause of action for fraud. As such, the *Summers* rule is unavailing to Plaintiffs.

In sum, Plaintiffs failed to make a prima facie showing that the individuals who obtained their signatures on the alleged recall petitions were agents of Jarvis, as opposed to agents of another entity, independent contractors, or unpaid volunteers who were working on the recall campaign. Thus, Plaintiffs failed to present facts which, if credited by a trier of fact (*Alpha, supra*, 200 Cal.App.4th at pp. 663–664), would entitle Plaintiffs to a judgment against Jarvis on their cause of action for fraud. Accordingly, the trial court erred in denying Jarvis’s special motion to strike.⁵

⁵ Having determined that Plaintiffs failed to show a probability of prevailing on their fraud claim, we need not address whether a private right of action exists for alleged fraud by a signature gatherer in an election campaign, or any other issues raised in the briefs.

DISPOSITION

The order denying Jarvis's special motion to strike is reversed and the matter is remanded with directions to grant the motion and to dismiss the action as to Jarvis. Jarvis's pending motion for judicial notice is denied as moot. Jarvis shall recover its costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.